INDEX

CITATIONS

CASES:

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.....

ROBERT SCOTT, Petitioner

v.

CITY OF TAMPA, a Municipal Corporation

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Circuit Court of Hillsborough County, Florida, wrote an opinion (Tr. 11-13). The Supreme Court of Florida's opinion (Tr. 42-48) is reported in Scott v. City of Tampa, 30 So. (2d) 300.

JURISDICTION

The petition for writ of certiorari was filed on August 15, 1947. Jurisdiction of this Court is attempted to be invoked under Section 344 (b) 28 U. S. C., (Jud. Code, Sec. 237).

QUESTION PRESENTED

We respectfully submit that the question as stated by petitioner on Pages 6 and 10 of his brief is incorrect. The question implies that the State Court imposed additional limitations in the conditional contract of guaranty, the alleged effect of which was to violate the due process clause of the Fourteenth Amendment and Article 1, Section 10, of the Federal Constitution. The guaranty of collection as the same appears in the paving certificates sued upon is set forth in the declaration (complaint), (Tr. 1) and is as follows:

> "The payment of this certificate and annual interest thereon is hereby guaranteed by the City of Tampa; and in case of non-payment of principal and interest at maturity by the owner of the property herein described, *and the holder or owner of this certificate shall have failed to collect the same by suit, against the property or the owner thereof,* (the same shall be redeemed by the City of Tampa at the option of the holder of this Certificate.")

The allegations of the original declaration (Tr. 1 and 9), and the amended declaration (Tr. 13-27), including the exhibits attached and made a part of the declaration, conclusively show that the period of time between the default in the payment of the paving certificates or any installment thereof, and the dates upon which suits were instituted by the guarantee, petioner, against the respondent, City of Tampa, on five paving certificates was from *fifteen to seventeen years* the defaults on the five certificates occurring at different times.

The allegations of the declaration and exhibits further show that during this long period of time, the property which the certificate holder had to proceed against by suit first before being entitled to sue the City of Tampa on its guaranty, had greatly depreciated

in value or was lost for non-payment of taxes. The State Court held that these allegations failed to show that the certificate holder had used due diligence, in first pursuing and exhausting his remedy against the property as the conditional contract of guaranty provided, before proceeding against the guarantor. (Opinion of State Court Tr. 42-48). The Court did not impose any additional limitations upon the conditional guaranty of collection by requiring due diligence on the part of the certificate holder, but such is the universal law and was part of the contract at the time it was made.

ARGUMENT

1. The question presented is not a federal question.

The gravamen of the State Court's decision is that petitioner is barred by laches from proceeding against the respondent on its conditional guaranty of collection. This Honorable Court has repeatedly held that the application of laches or the statute of limitations does not present a federal question. In *Great Western Telegraph Company v. Purdy,* 162 U. S. 329, 40 L. Ed. 986, the Court unequivocably held (Syll. No. 6):

> "The time when a cause of action accrues under a state statute is not a Federal question, but is a local question, on which the decisions of state courts cannot be reviewed by the Supreme Court of the United States."

In the case of *Moran v. Horsky, Jr.,* 178 U. S. 205, 44 L. Ed. 1038, the question was squarely decided, to-wit, (Syll.):

> "A decision by a state court sustaining the defense of *laches* against the assertion of a right to a mining claim after it had been abandoned for *fourteen years,* during which an apparent title had been obtained under a patent to a probate judge for the property as part of a town site, is based on a ground *independent of any Federal question.*"

In the oft cited case of *Preston v. City of Chicago, et al.*, 226 U. S. 447, 57 L. Ed. 293, the Court held (Syll. No. 2):

> "A judgment of a state court denying the petition for a writ of mandamus to compel the restoration to the pay rolls of the name of a policeman who had been removed from office, which rests in part upon the ruling that the right to the relief prayed was in any event *barred by long delay and laches*, cannot be reviewed by a writ of error from the Federal Supreme Court, although it was contended that he was denied due process of law by summary removal."

In the case of *Wood v. Chesborough, et al.*, 228 U. S. 672, 57 L. Ed. 1018, it is stated in the opinion (Page 1020 L. Ed. Report):

> "And yet it is well established that if there be Federal and non-Federal grounds and the latter be sufficient to support the judgment of the state court, there can be no review by this court. *And certainly the application of laches and the statute of limitations does not present a Federal question.* Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. Ed. 510, 32 Sup. Ct. Rep. 236; Preston v. Chicago, 226 U. S. 447, 450 ante, 293, 33 Sup. Ct. Rep. 177."

Also in *Caruthers v. Mayer, et al.*, 164 U. S. 325, 41 L. Ed. 453, the Court held (Syll.) as follows:

> "In ejectment for a mining claim a decision of the state court in favor of plaintiff's title under a patent of the United States, and *against the defenses of adverse possession and an alleged estoppel in pais, presents no Federal question.*"

We do not deem it necessary to encumber this brief with the further citation of authorities to sustain such a well established proposition. The holding of the Florida Supreme Court that the petitioner was guilty of laches in failing to use due diligence in first pursuing and exhausting his remedy against the property by

foreclosing his paving lien, was entirely a matter for the State Court to decide and certainly presents no federal question.

We therefore respectfully submit that the petition for writ of certiorari should be denied on this ground alone.

2. A Federal question cannot be raised for the first time in a petition for re-hearing in the State Court of last resort.

Even if the petition for writ of certiorari did present a Federal question, we respectfully submit that it is too late for that question to first be raised in a petition for re-hearing in the Florida Supreme Court. There is only one exception to this rule and that is when the State Court *entertains* a petition, *decides* the Federal question, *and this appears by the record.*

In the case at bar it appears that petitioner filed an "amendment" to his petition for re-hearing in the Florida Supreme Court (Tr. 49) in which he attempts to set up the purported Federal question, to-wit: that the ruling of the State Supreme Court against him violated the due process clause of the Fourteenth Amendment and Article 1, Sec. 10, of the Constitution of the United States. On May 19, 1947 the State Court entered its order denying the petition for re-hearing (Tr. 50) *without passing upon the purported Federal question nor making any reference to it whatsoever.*

We respectfully call the Court's attention to Paragraph (d) of Rule 25 of the Supreme Court of Florida which reads as follows:

> "A copy of the petition (for rehearing) shall be served upon the opposite party or counsel at or before the time of its submission to the Court and

> proof of such service transmitted to the Supreme Court with the petition. *It shall not be considered a part of the record in the cause unless so ordered or rehearing granted.* No argument shall be allowed on the petition."

No rehearing was granted nor was any order made making the petition for rehearing a part of the record in this cause, and this conclusively shows that no determination of the purported Federal questions was ever made by the State Court.

In *McMillen, et al., v. Ferrum Mining Co.,* 197 U. S. 343, 49 L. Ed. 784, this Honorable Court held that (Syll):

> "A Federal question first raised by a petition for a rehearing in the highest state court is too late to support the appellate jurisdiction of the Supreme Court of the United States, where the state court, *in denying the petition, made no reference to the Federal question.*"

Next is the case of *Waters-Pierce Oil Co. v. State of Texas,* 212 U. S. 112, 53 L. Ed. 431, wherein the Court said (Opinion Page 434, L. Ed. Report):

> "The attempt to assign new errors in the petition for rehearing, which was overruled *without an opinion passing on Federal questions,* cannot avail. McCorquodale v. Texas (211 U. S. 432, ante, 269, 20 Sup. Ct. Rep. 146), decided at this term of this court, and previous cases therein cited. We are therefore of the opinion that no substantial Federal question is presented in this case, and the writ of error must be dismissed."

In *Godchaux Co. v. Estopinal,* 251 U. S. 179, 64 L. Ed. 213, it is stated in the opinion (Page 214 L. Ed. Report), to-wit:

> "The settled rule is that, in order to give us jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must

have been especially set up there at the proper time and in the proper manner; and, further, that if first presented in a petition for rehearing, it comes too late *unless the Court actually entertains the petition and passes upon the point.* Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. Ed. 480, 484, 63 L. R. A. 33, 23 Sup. Ct. Rep. 375; St. Louis & S. F. R. Co. v. Shepherd, 240 U. S. 240, 60 L. ed. 622, 36 Sup. Ct. Rep. 274; Missouri P. R. Co. v. Taber, 244 U. S. 200, 61 L. ed. 1082, 37 Sup. Ct. Rep. 522." s

In *Mergenthaler Linotype Co. v. Davis, et al.,* 251 U. S. 256, 64 L. Ed. 255, the case of Godchaux v. Estopinal was followed, the opinion stating (Page 258, L. Ed. Report):

> "The only ground mentioned in the assignments of error upon which this writ could be sustained is conflict between specified sections of the Missouri statutes relating to transactions by foreign corporations and the Federal Constitution. *But this point came too late, being first advanced below on the motion for rehearing. Godchaux Co. v. Estopinal, supra.*"

Closely following the last two cited cases is *Jett Bros. Distilling Co. v. City of Carrollton,* 252 U. S. 1, 64 L. Ed. 421, where the Court stated (Page 424 L. Ed. Report), to-wit:

> "As we have said, whatever the effect of a petition for rehearing, it came too late to make the overruling of it, *in the absence of an opinion,* the basis of review by writ of error."

In *Wall v. Chesapeake & Ohio Railway Co.,* 251 U. S. 125, 65 L. Ed. 856, the Court said (Opinion Page 857 L. Ed. Report):

> "Our jurisdiction is invoked upon the theory that validity of the amending act was challenged below because of conflict with the Federal Constitution. But the point was not raised prior to the petition to the Supreme Court for a rehearing, which was

> overruled *without more.* 290 Ill. 227, 125 N. Ed. 20. It could have been presented earlier. According to the well-established rule, we may not now consider it; and the writ of error must be dismissed. Godchaux Co. v. Estopinal, 251 U. S. 179, 64 L. Ed. 213, 40 Sup. Ct. Rep. 116."

The court in the case of *Rooker v. Fidelity Trust Co.,* 261 U. S. 114, 67 L. Ed. 556, applied the unalterable rule. The Court in its opinion stated (Page 563 L. Ed. Report):

> "It has been examined, and we find it does not show that the question was raised in any way prior to the judgment of affirmance in the Supreme Court. In their assignments of error on the appeal to that court the plaintiffs said nothing about the statute or its validity; nor was there any reference to either in the court's opinion. All that appears is that, after the judgment of affirmance, the plaintiffs sought to raise the question by a petition for rehearing, *which was denied without opinion. But that effort came too late.* Bushnell v. Crooke Min. & Smelting Co. 148 U. S. 682, 689, 37 L. ed. 610, 612, 13 Sup. Ct. Rep. 771; Godchaux Co. v. Estopinal, 251 U. S. 179, 64 L. Ed. 213, 40 Sup. Ct. Rep. 116; Citizens Nat. Bank v. Durr, 257 U. S. 99, 106, 66 L. ed. 149, 152, 42 Sup. Ct. Rep. 15."

One of the last, if not the latest decision of this Honorable Court on this academic question is *Baldwin v. American Surety Co.,* 287 U. S. 156, 77 L. Ed. 231. In an able opinion by Mr. Justice Brandeis, the Court stated (Pages 235 and 236 L. Ed. Report):

> "The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931, must be dismissed for failure to make seasonably the Federal claim."
>
> "The Surety Company petitioned for a re-hearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Four-

teenth Amendment. *The petition was denied without opinion."*

There are many other decisions of this Honorable Court on this question, but we have been unable to find a single instance in which the Court departed from the rule laid down in the above cited cases.

The order of the Florida Supreme Court denying the petition for rehearing (Tr. 50), made no mention whatsoever of the purported Federal questions which the petitioner attempted to raise for the first time in an amendment to his petition for rehearing. The effect of such order is to bring the case at bar squarely within the rule laid down by the above authorities.

CONCLUSION

We respectfully submit that the question of laches which the petitioner has attempted to raise is a matter solely for the State Court to decide and, secondly, that even if it could possibly be construed to present a Federal question, it came too late when raised for the first time in a petition for rehearing in the State Court of last resort, which summarily denied the petition without opinion and without making any reference whatsoever or mention of any grounds in the petition for rehearing purporting to raise Federal questions. We, therefore, respectfully submit that the petition for writ of certiorari should be denied.

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